Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

LOUIS POLUS, ET AL.,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 37A03-0607-CV-329
	)	
MARY SCHEURICH, ET AL.,	)	
	)	
Appellees.	)	

APPEAL FROM THE JASPER SUPERIOR COURT
The Honorable Jeffrey J. Dywan, Special Judge
Cause No. 37D01-0508-PL-324

November 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Louis Polus, Robert Forbes, Karl Bapst, Richard Laughlin, Randy Van Kley, David Bissell, Cheryle Lewandowski, John Sumara, Dan Lewandowski, Norma Mateer, Jack Mateer, Caroline Turnpaugh, Don Gizel, Patricia Gizel, Joel Chermak, and Shirley Forbes (collectively "the Neighbors") appeal from the trial court's order granting a motion filed by Mary Scheurich, Director of Planning and Development for Jasper County; John Korniak, President, Jasper County Board of Zoning Appeals; Richard E. Maxwell, President, Board of County Commissioners, Jasper County, Indiana; and Ronald P. McIlwain, President, County Council of Jasper County, Indiana (collectively "County Officials") to dismiss the Neighbors' declaratory judgment action. We address a single dispositive issue on appeal, namely, whether the trial court erred when it granted the County Officials' motion to dismiss the Neighbors' complaint.

We affirm.

FACTS AND PROCEDURAL HISTORY

In Spring 2003, the Jasper County Building Commissioner issued Improvement Location Permit No. 03085 ("the Permit") for Lot 148 in Sculley Square Subdivision ("Lot 148"). The owner of Lot 148[1] subsequently built a manufactured home on the property. Thereafter, the Jasper County Board of Zoning Appeals ("BZA") revoked the Permit.

[1] In their brief, the County Officials refer to the "alleged owners and/or former owners" of Lot 148, implying that ownership of Lot 148 may have changed since the improvement permit was originally issued. Appellants' Brief at 3. Because the parties do not clarify this ambiguity, we refer generically to "the owner of Lot 148" without naming or numbering the owners.

In August 2003, the owner of Lot 148 filed an Affirmed Petition and Application for Writ of Certiorari, Judicial Review, Declaratory Judgment, and for Damages under cause number 37D01-0308-PL-326 ("cause number 326"). In that action, the owner of Lot 148 challenged the revocation of the Permit, naming as defendants Scheurich, in her capacity as Director of Planning and Development for Jasper County; Van Meerten, as President of the BZA; Maxwell, as the President of the Jasper County Board of Commissioners; McIlwain, as President of the Jasper County Council; and other individuals, including the Neighbors. On December 1, 2004, the Neighbors moved to be dismissed from the action, and the trial court dismissed the Neighbors by stipulation of the parties on January 18, 2005.

On June 28, 2005, Scheurich, Maxwell, McIlwain, and Van Meerten, entered into an agreed judgment ("the Agreed Judgment") with the owner of Lot 148. The Agreed Judgment provides, in relevant part:

> 1. Judgment shall be entered in favor of [the owner of Lot 148] and against [Scheurich, Van Meerten, Maxwell, and McIlwain in their official capacities ("County Defendants")] only on those portions of Counts I and VI of [the owner's] Complaint, pertaining to the petition for writ of certiorari and judicial review pursuant to Ind. Code [Section] 36-7-4-1000 et. [seq.] of the July 22, 2003 decision of the Defendant Jasper County Board of Zoning Appeals to revoke Improvement Location Permit No. 03085, issued by Defendant, Scheurich, Director of Planning and Development for Jasper County, Indiana, to [the owner of Lot 148]. Said decision of the Jasper County Board of Zoning Appeals is hereby REVERSED and the matter of Improvement Location Permit No. 03085 is hereby REMANDED to the Director of Planning and Development of Jasper County for immediate reinstatement, in accordance with the Parties' stipulation of settlement.
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> 2. The Defendant Scheurich is further ORDERED to issue forthwith to [the owner of Lot 148] a Certificate of Occupancy for Lot 148 in

> Sculley Square Subdivision, Division No. 4, as shown on plat recorded Plat Record 1, Page 114 of the Plat Recording in the Office of the Jasper County Recorder, in accordance with the Parties' stipulation of settlement.
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> 3. The remaining counts and claims in the Complaint against the County Defendants, namely, those portions of Count I and Count VI not pertaining to the petition for writ of certiorari and judicial review, and all of Counts II, III, IV, and V are not [a]ffected in any[]way, by the foregoing judgment on the portions of Count I and Count VI pertaining to the petition for writ of certiorari and judicial review, so that adjudication of Counts II, III, and IV and V may continue. Said Judgment on those portions of Counts I and VI pertaining to the petition for writ of certiorari and judicial review, shall be WITHOUT PREJUDICE to any Party with respect to the prosecution or defense of the remaining portions of Counts I and VI, and all of Counts II, III, IV and V of [the owner's] Complaint.

Appellants' App. 25-26 (emphasis in original). On July 14, 2005, the Neighbors filed a motion to intervene and for a temporary restraining order without notice in cause number 326. The Neighbors also asked the trial court to vacate the Agreed Judgment and to declare the settlement in cause number 326 null and void. After a hearing, the trial court denied the Neighbors' motion to intervene and their motion for a restraining order. The Neighbors did not appeal.

On August 24, 2005, the Neighbors filed a complaint against the County Officials, seeking a declaration that the Agreed Judgment was "ultra vires and void." Appellants' App. at 15. The Neighbors subsequently filed an amended complaint, requesting that the trial court mandate the parties in cause number 326 to litigate and not review, vacate, rescind and/or alter the original BZA decision on the location permit. The County Officials filed a motion to dismiss under Indiana Trial Rule 12(B)(6). After a hearing, the trial court granted that motion, and the Neighbors appeal.

DISCUSSION AND DECISION

The Neighbors appeal from the denial of their motion to dismiss their amended complaint under Indiana Trial Rule 12(B)(6). A Trial Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim rather than the facts supporting the claim. Gorski v. DRR, Inc., 801 N.E.2d 642, 644-45 (Ind. Ct. App. 2003). Dismissal for failure to state a claim is proper if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. Id. When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, this court accepts as true the facts alleged in the complaint. Dillon v. Chicago S.S. & N. B. Ry. (In re Train Collision), 670 N.E.2d 902, 905 (Ind. Ct. App. 1996), trans. denied, cert. denied 522 U.S. 914 (1997). A court need not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading. Trail v. Boys & Girls Clubs of Northwest Ind., 845 N.E.2d 130, 134 (Ind. 2006).

In the present appeal and the underlying complaint, the Neighbors seek to collaterally attack the Agreed Judgment in cause number 326. The Neighbors contend that the Agreed Judgment entered into by the County Officials is ultra vires and void and, therefore, subject to collateral attack. The County Officials respond that the Neighbors have not alleged a permissible basis to collaterally attack the Agreed Judgment.[2] We agree with the County Officials.

[2] In their brief, the County Officials request that we strike the portions of the Neighbors' brief alleging fraud because (1) fraud was never pleaded and, therefore, it is irrelevant; (2) such allegations are without legal basis, and (3) the allegations are "scandalous and prejudicial." Appellees' Brief at 7. The County Officials are correct that the Neighbors did not plead fraud in their complaint or amended

The judgment of a court having jurisdiction of the subject matter of the suit and of the person, however irregular, is not void and impeachable collaterally, unless it may be for fraud. Mishler v. County of Elkhart, 544 N.E.2d 149, 151 (Ind. 1989). To attack collaterally a trial court's judgment, it must be shown that the judgment is void rather than merely defective or voidable. Id. The purpose of prohibiting collateral attacks is to avoid endless litigation. Id.

In Mishler, the trial court considered whether neighboring landowners could collaterally attack a trial court's decision ordering county commissioners to rezone a parcel of property. There, after the county commissioners had denied an applicant's request for rezoning, the applicant filed suit alleging that the commissioners' action constituted a taking and seeking money damages. The landowners who lived near the parcel at issue ("neighboring landowners") knew about the applicant's suit but did nothing to intervene. The case was venued to a court in another county, and that court later ruled that there was a taking and ordered the commissioners to grant the rezoning request.

Shortly after judgment had been entered in the applicant's suit, the neighboring landowners moved to intervene in the applicant's suit. The trial court denied that motion. The neighboring landowners then filed a separate action in their own county, collaterally attacking the judgment entered in the applicant's suit. The trial court granted the applicant's motion to dismiss the neighboring landowners action as an impermissible

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complaint. As stated below, we conclude that the Neighbors have failed to state a claim for which relief can be granted precisely because they failed to plead fraud in the complaint or amended complaint. Although we therefore do not consider the fraud allegations in the Neighbors' brief, we nevertheless deny the County Officials' request to strike the fraud allegations in the Neighbors' brief.

collateral attack, and this court affirmed on appeal. This court reasoned, in part, that the neighboring landowners could have appealed from the denial of their motion to intervene in the applicant's suit and that "[t]heir decision not to do so brought the matter to a close." Id. at 153.

Here, the Neighbors do not argue that the trial court in cause number 326 was without subject matter or personal jurisdiction to enter judgment in that case. Thus, the Agreed Judgment is subject to collateral attack only if it was based on fraud. See Mishler, 544 N.E.2d at 151. The Neighbors have alleged fraud in their brief on appeal, but they did not allege fraud in their complaint or amended complaint. As noted above, our review of an order granting a motion to dismiss is limited to the pleadings. See Dillon, 670 N.E.2d at 905. Because the Neighbors did not allege permissible grounds in their pleadings for collaterally attacking the Agreed Judgment entered in cause number 326, they have failed to state a claim upon which relief can be granted. See Ind. Trial Rule 12(B)(6). As such, we conclude that the trial court did not err when it granted the County Officials' motion to dismiss the Neighbors' amended complaint.[3]

Further, as in Mishler, a previous action resulted in a judgment in favor of the complaining landowner. And, as in Mishler, the Neighbors (1) filed a motion to intervene in the prior action after the judgment was entered, (2) the trial court denied that motion, and (3) the Neighbors did not appeal from that ruling. The Neighbors decision not to appeal the denial of their motion to intervene "brought the matter to a close." Mishler, 544 N.E.2d at 153. After having been granted their request to be dismissed from

[3] Under Trial Rule 12(B), within ten days of the dismissal order, the Neighbors could have filed an amended complaint alleging fraud.

the prior action, and having not appealed the denial of their motion to intervene after judgment was entered, the Neighbors cannot now collaterally attack that judgment in a separate action. See id.

Affirmed.

DARDEN, J., and FRIEDLANDER, J., concur.